2006
CIRCUIT COURTS OF APPEALS
CASE BRIEFS

Click HERE for April – June

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January – March

1st CIRCUIT

U.S. v. Samboy, 433 F.3d 154, December 29, 2005

Click HERE for the court's opinion.

There is no legal rule requiring police to seek a warrant as soon as probable cause likely exists. An exigency may exist even when police might have foreseen the circumstances. An exigency may be negated when the government unreasonably and deliberately delays or avoids obtaining a warrant.

FACTS: Padin was arrested for conspiracy and distribution of crack cocaine. He identified his supplier as Samboy and said that the drugs were kept in Samboy's apartment as well as the apartment below. Acting as an informant, Padin made a series of phone calls, beginning at 2:30 PM, to set up a controlled buy from Samboy. Samboy, although reluctant at first, made incrimination statements and eventually agreed to the deal. Police arrested Dellossantos between 5:30 and 6:00 PM when he delivered the drugs. They sent for a search warrant but before getting it went directly to Samboy's apartment. They arrived at 6:00 PM, knocked and announced and, when they received no response, used a key obtained from Dellossantos to enter. They found Samboy as well as more drugs. They arrested Samboy, secured the apartment, and waited on the warrant. Samboy argued that the failure to seek a warrant earlier in the afternoon, when arguable probable cause existed, rendered the warrantless entry unreasonable.

ISSUES: (1) Must police seek a warrant as soon as probable cause likely exists?

(2) Did delay in obtaining a warrant after probable cause likely existed negate the exigency of risk of removal / concealment of evidence?

HELD: (1) No.

(2) No.

DISCUSSION: At the time the police entered Samboy's apartment, they knew that Samboy was present, that he had recently sent Dellossantos to deliver drugs, that Dellossantos had been arrested and therefore had not returned or contacted Samboy, and that they had received no response after knocking and announcing their presence. There was a "reasonable belief that Samboy was alerted to their presence and might try to destroy evidence in the apartment. Consequently, there were sufficient exigent circumstances to justify entry into the fourth floor apartment without obtaining a warrant . . . ."

Assuming that the police had probable cause to seek a warrant as early as 4:30, there was about an hour-and-forty-five minute delay between the time probable cause arose and the time Samboy was arrested. There is no legal rule requiring the police to seek a warrant as soon as probable cause likely exists to seek a warrant. Nor does the fact that in setting up a controlled buy the police might have foreseen the eventual entry into Samboy's apartment, standing alone, prevent application of the exigent circumstances doctrine. "Unforeseeability has never been recognized as an element of the exigent circumstances exception . . . ." Exigent circumstances do not exist when the "circumstances [were] created by government officials who unreasonably and deliberately delayed or avoided obtaining the warrant."

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***U.S. v. Coker**, 433 F.3d 39, December 28, 2005*

Click HERE for the court's opinion.

For Sixth Amendment right to counsel purposes, a federal charge is a different "offense" from a state charge, even when they both deal with the same underlying conduct and have essentially the same elements. Federal agents can interview and take a statement from the suspect without notification to and the presence of the attorney representing the suspect on the state charge.

FACTS: Coker had an attorney appointed to represent him in state court for arson. After he was released on bond, the Bureau of Alcohol, Tobacco, and Firearms (BATF) opened a federal investigation. BATF agents contacted Coker and interviewed him without notifying his state attorney or having the attorney present. Coker confessed to the agents and was later indicted for attempted arson in violation of 18 U.S.C. § 844(i).
ISSUE: Did BATF agents violate Coker's Sixth Amendment right to counsel?

HELD: No.

DISCUSSION: The Sixth Amendment right to counsel is offense specific. There is no constitutional difference between the meaning of the term "offense" in the contexts of double jeopardy and of the right to counsel. For double jeopardy purposes, a defendant's conduct in violation of two separate sovereigns ("the dual sovereignty doctrine") constitutes two distinct "offenses."

The dual sovereignty doctrine applies in the Sixth Amendment right to counsel context. Therefore, the state and federal offenses in Coker's case are different "offenses" for Sixth Amendment purposes.

To establish the exception to the dual sovereignty doctrine, a defendant "must produce some evidence tending to prove that . . . one sovereign was a pawn of the other, with the result that the notion of two supposedly

independent prosecution.

The **Second Circuit** disagrees – *U.S. v. Mills*, 412 F.3d 325 (2005).
The **Fifth Circuit** agrees – *U.S. v. Avants*, 278 F.3d 510 (2002).

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3rd CIRCUIT

***U.S. v. Kiam**, 432 F.3d 524, January 3, 2006*

Click HERE for the court's opinion.

A person seeking entry into the United States does *not* have a right to remain silent regarding matters concerning admissibility. An alien at the border must convince a border inspector of his or her admissibility to the country by affirmative evidence. While an alien is unquestionably in "custody" until he is admitted to the country, persons seeking entry at the border may be questioned about admissibility without *Miranda* warnings.

FACTS: When Kiam arrived on an international flight, he was escorted by Customs and Border Protection (CBP) inspectors to a secondary inspection area. During a twenty-five minute interview by a CBP Senior Inspector, Kiam admitted that he was "illegally helping" three other passengers enter this country." The inspector did not give Kiam *Miranda* warnings at any time during this interview. The inspector then contacted Immigration and Customs Enforcement (ICE). When he arrived, the ICE agent administered *Miranda* warnings. Kiam waived these rights and eventually gave an incriminating statement.

ISSUE: Was the CBP inspector required to give *Miranda* warnings?

HELD: No.

DISCUSSION: Because the CBP inspector's questions still had a bearing on Kiam's admissibility, Kiam was not entitled to *Miranda* warnings. CBP inspectors do not have to immediately cut off their questioning because they think they may be going beyond what could be considered "routine" immigration questioning. *Miranda* warnings are not required even if a CBP inspector subjectively suspects criminal conduct in addition to inadmissibility. The mere overlap of the admissibility questioning with the elements of criminal liability does not trigger *Miranda*.

Miranda may apply at some point when a CBP inspector has sufficient information to make a determination regarding admissibility and the questions objectively cease to have a bearing on the grounds for admissibility and instead only further a potential criminal prosecution.

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4th CIRCUIT

***U.S. v. Rizzi**, 434 F.3d 669, January 9, 2006*

Click HERE for the court's opinion.

Search warrants for controlled substances are governed exclusively by 21 U.S.C. § 879, and may be executed at any time of day or night without any showing or finding by the judge that a nighttime execution is necessary.

FACTS: Federal and state agents executed a search warrant for drugs at 4:30 AM. Because the officers did not attempt to demonstrate, and the authorizing judicial officer did not determine, that "good cause" existed for a nighttime search as required by Federal Rules of Criminal Procedure (FRCrP) 41(e)(2)(B), the district court suppressed the guns.

ISSUE: Does FRCrP 41(e)(2)(B) require that agents establish or the judge to find "good cause" to execute a search warrant for controlled substances outside daytime hours?

HELD: No.

DISCUSSION: FRCrP 41, which limits execution of search warrants to daytime hours absent good cause shown, is a general provision governing search warrants. Congress may enact more specific provisions when it finds a need for privacy to be counterbalanced by the public need for more effective law enforcement. Title 21 U.S.C. § 879, pertaining to search warrants for controlled substances, is one such provision. Section 879 states:

> A search warrant relating to offenses involving controlled substances may be served at any time of the day or night if the judge or United States magistrate [United States magistrate judge] issuing the warrant is satisfied that there is probable cause to believe that grounds exist for the warrant and for its service at such time.

Specific laws trump general ones. Rule 41, the general rule, is not applicable to searches specifically addressed by § 879. "When a search warrant involves violations of drug crimes, the warrant can be served day or night so long as the warrant *itself* is supported by probable cause. And to the extent that § 879 might be found to conflict with the general requirement of showing good cause for nighttime searches contained in Rule 41(e), we hold that § 879 applies exclusively."

NOTE: The court's ruling has no effect on the application of 18 U.S.C. § 3109, Knock and Announce, to the execution of nighttime warrants.

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6th CIRCUIT

***Armstrong v. City of Melvindale**, 432 F.3d 695, January 6, 2006*

Click HERE for the court's opinion.

The Fourth Amendment requires probable cause to believe that *fruits, instrumentalities, or evidence of a crime* will be found at the place to be searched. Search warrants for items that lack any criminal link are unconstitutional.

FACTS: Defendants executed a forfeiture warrant on CadVisions to inventory and seize assets. During the search, Armstrong entered the store and asserted ownership of the computers in the building. He claimed to have ownership documents, but presented only his business card. Defendants seized the computers.

Defendants then sought a warrant to search Armstrong's business, Computer Time, for the documents that would substantiate Armstrong's ownership claim. When the warrant was served, no documents were found because Armstrong had lied about owning the computers. They did, however, find marijuana.

ISSUE: Does the Fourth Amendment require probable cause that the items sought constitute evidence of crime?

HELD: Yes.

DISCUSSION: The Fourth Amendment requires probable cause to believe that *fruits, instrumentalities, or evidence of a crime* will be found at the place to be searched. *See Warden v. Hayden*, 387 U.S. 294 (1967). Though Defendants may have had probable cause to believe the ownership documents would be found at Computer Time, no probable cause existed to believe the documents themselves evidenced a crime. The officers did not seek to obtain the warrant on the strength of any link between those ownership documents and a crime. Because the object of the search -- the ownership papers -- lacked any evident criminal link, the search was unconstitutional.

* * * *

***U.S. v. Dillard**, 438 F.3d 675, February 27, 2006*

Click HERE for the court's opinion.

Tenants of apartments and duplexes have a reasonable expectation of privacy in *locked* common areas. Because a duplex is more akin to a single-family home than a large apartment building, tenants may also have a reasonable expectation of privacy in unlocked areas such as a basement.

FACTS: After Dillard was arrested in connection with a drug sale, officers drove to his duplex, a building with two units – one on the first floor and Dillard's on the second floor. The front door of the duplex led to a common hallway. On the left side there was a door that led to a stairway to the second floor. At the top of the stairway was the door to Dillard's apartment. When the officers arrived, they found the front door ajar about twelve inches. They entered the common hallway, discovered the stairway door also open, climbed the stairs to Dillard's apartment, and knocked. Dillard's girlfriend let them in and consented to a search. They found and seized crack cocaine.

ISSUE: Did Dillard have a reasonable expectation of privacy in the common hallway and stairway of the duplex?

HELD: No.

DISCUSSION: Tenants of apartments and duplexes have a reasonable expectation of privacy in *locked* (emphasis added) common areas because a "tenant expects other tenants and invited guests to enter in the common areas of the building, but he does not expect trespassers." Obviously the expectation of privacy in a locked building is greater than in an unlocked building.

Because a duplex is more akin to a single-family home than a large apartment building, tenants may also have a reasonable expectation of privacy in unlocked areas such as a basement. The nature of the living arrangements of a duplex, as opposed to a multi-unit apartment building, affords the tenant of the duplex a greater expectation of privacy in areas the tenant of the multi-unit apartment building would not enjoy. In a duplex, access to such areas is limited to the duplex's tenants and landlord.

Because Dillard made no effort to maintain his privacy in the common hallway and stairway (as distinguished from a basement), he did not have an objectively reasonable expectation of privacy in those areas. By not locking the duplex's doors, Dillard did nothing to indicate to the officers that they were not welcome in the common areas.

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8th CIRCUIT

***U.S. v. Morris**, 436 F.3d 1045, January 31, 2006*

Click HERE for the court's opinion.

Opening the locked screen door, although it gave access only to the small space between the screen door and the inner door, was a search for purposes of the Fourth Amendment.

To go ahead and enter, police must have reasonable suspicion that further compliance with the knock-and-announce requirement would inhibit the effective investigation of the crime.

FACTS: Police obtained a warrant to search Morris's home for marijuana. There were two doors located at the front entryway: an outer screen door and an inner wood-framed front door with a small window. Two seconds after knocking and announcing, they opened the locked screen door with a tool. After stepping up to the inner door and seeing a male come to the window of the door and look out, the officer announced, "Police officer, search warrant." He then heard the sound of running on a wood floor. Ten seconds later, convinced that no one was going to open the door, police breached the door with a ram. They discovered marijuana and cocaine in the residence.

ISSUE: (1) Did breaching the outer screen door two seconds after knocking and announcing violate the Fourth Amendment?

(2) Did breaching the inner door ten seconds after knocking and announcing violate the Fourth Amendment?

HELD: (1) Yes.

(2) No.

DISCUSSION: The screen door. Opening the locked screen door, although it gave access only to the small space between the screen door and the inner door, was a search for purposes of the Fourth Amendment, as the police entered an area immediately adjacent to and associated with the home. In some instances, the flexible requirements of "reasonableness" may permit the breach of a screen door without a prior knock and announcement, even where there is no basis to enter the remainder of the residence immediately. Frequently, in felony drug investigations, there is a risk of concealment or destruction of evidence if advance notice is given. The government does not justify the breach of the screen door with this exigency but instead argues that the breach of the screen door was a reasonable preparatory step to allow police to gather *additional* reasons to believe that evidence might be destroyed. Otherwise, the delay in opening the outer door would interfere with recovery of the evidence. The time required to open the screen door and reach the inner door, which appeared to be only two seconds, is not great enough to support the government's theory of reasonableness.

The inner door. To go ahead and enter, police must have reasonable suspicion that further compliance with the knock-and-announce requirement would inhibit the effective investigation of the crime. Given the risk of destruction of evidence usually present in drug trafficking investigations, the relatively modest size of the home, and the likelihood that occupants would be awake at the time of the search, entry into the residence of Morris, a drug trafficking suspect, ten seconds after knocking and announcing at a reasonable evening hour, was constitutionally reasonable.

* * * *

***U.S. v. Richardson**, 439 F.3d 421, March 2, 2006*

Click HERE for the court's opinion.

The Court overrules its prior decisions and now holds that convictions for being a felon in possession, and being a drug user in possession, based upon a single act of possession of a firearm, violate Double Jeopardy.

FACTS: At the time Richardson was in possession of a firearm, he was both a convicted felon and drug user. He was convicted in two separate counts of being a felon in possession of a firearm, and being a drug user in possession of a firearm.

ISSUE: Can a defendant be convicted and punished under both the felon in possession statute, as well as the drug user in possession statute, based upon a single act of possession?

HELD: No.

DISCUSSION: The Court overruled its prior cases, now finding that Congress intended that only one "unit of prosecution" result from a single incident of possession, regardless of whether the defendant satisfied more than one statutory classification, possessed more than one firearm, or possessed a firearm and ammunition.

9th CIRCUIT

***U.S. v. Gourde**, 440 F.3d 1065 (en banc), March 9, 2006*

Click HERE for the court's opinion.

Paid membership in a child pornography download site can establish probable cause that there are child pornographic images, or evidence of same, on the suspect's computer.

FACTS: Gourde was a paying member of a website that offered child pornographic images for download. Joining this website required several intentional and distinct steps to establish the account, and Gourde never cancelled the membership. The affidavit asserted that in the affiant's experience, collectors of child pornography keep their images. The affidavit also asserted that those trained in computer forensics could determine whether images had been downloaded onto a computer even if the user deleted them.

ISSUE: Did the affidavit establish probable cause there would be evidence of child pornographic images on the subject's computer?

HELD: Yes.

DISCUSSION: Being eligible to download the forbidden images required an intentional act and payment, and one would only become a member to get the images. The membership in the site, the affiant's knowledge that those who download such images usually keep them, and the ability to recover forensic trace evidence of the images on the computer were sufficient to establish probable cause to support the search warrant.

* * * *

***U.S. v. Lopez-Perera**, 438 F.3d 932, February 21, 2006*

Click HERE for the court's opinion.

An illegal alien who presents himself at a port of entry, and is found in possession of a firearm before he leaves the port, cannot be convicted of being an illegal alien in the United States in possession of a firearm.

FACTS: The defendant, a Mexican citizen, drove from Mexico into the San Ysidro Port of Entry in California. An officer did not accept the defendant's claim of U.S. citizenship and directed him toward a secondary inspection. The defendant waited 25 minutes and then began driving toward an exit. Officers stopped him. A search revealed a firearm.

ISSUE: Does physical presence at a port of entry satisfy the element of being "in the United States" to be convicted of being an illegal alien in the United States in possession of a firearm?

HELD: No.

DISCUSSION: The defendant never "entered" the United States, and therefore could not have been "in" the United States. In the context of immigration law, "enter" is a specific legal term. It requires: (1) crossing into the territorial limits of the United States – which defendant in this case did; (2) (a) inspection and admission by an immigration officer, or (b) actual and intentional evasion of inspection; **and** (3) freedom from official restraint. The defendant was never free from official restraint.

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April – June

1st CIRCUIT

McConkie v. Nichols, 446 F.3d 258, May 15, 2006

Click HERE for the court's opinion.

SUMMARY: Abuse of power violates the Fifth Amendment Due Process Clause when it is so extreme and egregious as to "shock the conscience." The conduct must be truly outrageous, uncivilized, and intolerable; it must be stunning, evidencing more than humdrum legal error. Telling someone that his statement would remain confidential and thereby knowingly misrepresenting the nature of his Fifth Amendment right against self-incrimination is not so egregious that it shocks the conscience.

FACTS: During a tape-recorded, non-custodial interview with a child sexual abuse suspect, the detective told the suspect that "this stuff stays confidential, especially because a juvenile is involved." The suspect admitted to sexual contact with the child. These admissions were introduced against him in the subsequent criminal trial. This civil lawsuit alleges that the detective intentionally deceived him about his Fifth Amendment right against self-incrimination in violation of his Fifth Amendment Due Process rights.

ISSUE: Did the detective's tactics during the interview violate the Fifth Amendment Due Process Clause?

HELD: No.

DISCUSSION: When a case involves an alleged abuse of power, it is a violation of substantive due process only when it is so extreme and egregious as to shock the contemporary conscience. In order to shock the conscience, the conduct must be truly outrageous, uncivilized, and intolerable; it must be stunning, evidencing more than humdrum legal error. Exclusionary rules rather than damages often can provide the deterrent necessary to deter unlawful questioning. Even construing the detective's statements as lies, lies alone are not necessarily considered conscience-shocking. Although telling the plaintiff that his statement would remain confidential and thereby knowingly misrepresenting the nature of his Fifth Amendment rights is not something to be condoned, it is not so egregious that it shocks the conscience. It might be conscience-shocking for an officer to elicit or provide knowingly false information about a suspect. Deliberately fabricating evidence to

frame someone for a crime the person did not commit and to protect the true perpetrators is a violation of due process.

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5th CIRCUIT

U.S. v. Pope, 2006 U.S. App. LEXIS 13928, *June 6, 2006*

Click HERE for the court's opinion.

SUMMARY: An officer's subjective motive to search does matter. When applying for a search warrant, the stated purpose of the warrant must match the officer's actual motivation for the search.

FACTS: An officer received a tip that the defendant had a meth lab at her house, but he lacked probable cause. Seventy-eight days earlier, the defendant had illegally sold six prescription pills to this same officer, acting undercover. Based on this information the officer was able to obtain a warrant, with the stated purpose of searching for evidence of the earlier crime. The officer's actual motivation was to find the meth lab. He entered, observed the meth lab in plain view, and then went to obtain a second warrant based on this observation.

ISSUE: Must the stated purpose of the warrant match the officer's actual motivation for the search?

HELD: Yes.

DISCUSSION: An officer's underlying motivation does matter, and it must match the stated objective of the warrant. It is not enough that probable cause exists to search for evidence of one crime if the officer is actually looking for evidence of a different crime than given in the warrant. In essence, the officer has lied in the initial affidavit since the stated purpose of the warrant application does not match the officer's actual motivation. The entry is unlawful. The good faith reliance exception to the exclusionary rule does not apply if a second warrant is based on such an unlawful entry. (This rule is contrary to the one established for pretextual traffic stops. See also *Brigham City v. Stuart*, 126 S. Ct. 1943, 2006 U.S. LEXIS 4155, May 22, 2006 reported in QR-7-3).

* * * *

U.S. v. Alvarez, 451 F.3d 320, June 1, 2006

Click HERE for the court's opinion.

SUMMARY: For purposes of 21 U.S.C. § 860(e)(1), Distribution of Controlled Substances Within 1000 Feet of a Playground, the government must prove that the controlled substance offense took place within 1000 feet of an outdoor facility intended for recreation that is open to the public and that includes three or more separate apparatus intended for the recreation of children.

FACTS: Defendant was convicted of distributing controlled substances within 1000 feet of a playground, but the evidence presented in court failed to establish that the playground included three or more separate apparatus intended for the recreation of children.

ISSUE: Does 21 U.S.C. § 860(e)(1), Distribution of a Controlled Substance within 1000 Feet of a Playground, require specific proof that the facility included three or more apparatus intended for the recreation of children?

HELD: Yes

DISCUSSION: 21 U.S.C. § 860(e)(1) is a substantive offense for which all elements must be proven beyond a reasonable doubt. The statutory definition of a playground - an outdoor facility, intended for recreation, open to the public that includes three or more separate apparatus intended for the recreation of children - is a required element of proof.

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7th CIRCUIT

U.S. v. Miller, 450 F.3d 270, June 7, 2006

Click HERE for the court's opinion.

SUMMARY: A factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates is not coercion. An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that amounts to coercion.

FACTS: The house shared by Miller and his girlfriend contained both drugs and illegal weapons, including an AK-47 assault rifle. Probable cause existed to arrest them both. Miller was arrested and twice given *Miranda* warnings before saying anything. The police offered Miller a way to retain his freedom: come clean and cooperate in the investigation of his suppliers and customers. If Miller chose silence plus counsel—as the police told him he had every right to do—the natural consequence was immediate custody and prosecution for Miller and his girlfriend, making it necessary to place their child in foster care. Miller chose to pledge cooperation and both were left at liberty, just as the police had promised. Miller was not prosecuted until after he reneged on his pledge to help the investigation.

ISSUE: Did police coerce Miller into giving statements by telling him that he and his girlfriend would be arrested and their child placed in foster care unless he cooperated?

HELD: No.

DISCUSION: An objectively unwarranted threat to arrest or hold a suspect's paramour, spouse, or relative without probable cause could be the sort of overbearing conduct that society discourages by excluding the resultant statements. But a factually accurate statement that the police will act on probable cause to arrest a third party unless the suspect cooperates is different. A choice between cooperation and freedom, on the one hand,

and silence followed by custody and prosecution, on the other, is a common one. This is the real choice many suspects face whether or not the police lay it out it in so many words. Clear articulation of the options makes a choice better informed and thus more rather than less voluntary.

The choice that the police extended—cooperate and remain free, or be silent and enter custody together with his girlfriend—made Miller better off. An offer that makes the recipient better off cannot be condemned as coercive.

* * * *

U.S. v. Goodwin, 449 F.3d 766, May 24, 2006

Click HERE for the court's opinion.

SUMMARY: Fitting a drug courier profile based on a last minute cash purchase of a train ticket, combined with a response to questioning that appears to be a fabrication, amounts to reasonable suspicion.

More than reasonable suspicion may be required when the stop is more oppressive than a typical *Terry* stop.

FACTS: Goodwin purchased a one-way ticket on the train from Chicago to Denver one hour before departure. Because this fit a drug courier profile, police sought to question him in a voluntary contact. They boarded the train five minutes before departure time and asked Goodwin for consent to search his bags. Goodwin refused at first, but then stated the bags were locked and that he had lost the key. They offered to help open the bags without damaging them, but he refused. Based on the profile and this apparent fabrication about the lost key, the officers detained the bags. Goodwin accompanied the officers at their request to get a receipt for the bags. He was told he was not under arrest. The train, which ran only once a day, left the station. When he learned that they would subject the bags to a canine sniff, Goodwin produced the key and drugs were found.

ISSUE: 1. Does fitting a drug courier profile by purchasing a one-way, cash ticket shortly before departure, combined with an apparent fabrication about lost keys, amount to reasonable suspicion allowing a bag to be detained?

2. Was more than reasonable suspicion required because the interference with Goodwin's freedom of movement was so much greater than in a typical *Terry* stop?

HELD: 1. Yes.

2. No.

DISCUSSION: Merely fitting a drug courier profile by purchasing a one-way ticket with cash at the last minute is certainly not reasonable suspicion. But no reasonable suspicion was required for the officers to approach and question Goodwin without detaining him. Once he made an apparent fabrication about a lost key, reasonable suspicion existed, allowing the bags to be detained.

In this case the stop is more oppressive than a typical *Terry* stop since it would have delayed a potentially innocent person by 24 hours. In such a circumstance, more suspicion may be required than in a standard *Terry* stop. *See* U.S. v. Chaidez, 919 F.2d 1193 (7th Cir. 1990). But, this situation was in large part created by Goodwin as a result of his last minute ticket purchase. Police had no grounds for suspicion until then. The need for a stop increases if departure from the area is imminent. This left the officers no other good option to continue their investigation. Prolonging a stop is more difficult to justify if there is a feasible alternative. A less burdensome manner was not feasible in these circumstances.

* * * *

Shell v. U.S., 448 F.3d 951, May 23, 2006

Click HERE for the court's opinion.

SUMMARY: It is permissible to plant a listening device on an unwitting person pursuant to a Title III intercept order without that person's consent.

FACTS: Federal agents developed probable cause that an incarcerated gang member (Hoover) was still running his gang from prison by verbally passing instructions to certain visitors. The agents obtained a Title III intercept order to monitor conversations between Hoover and named visitors. The listening device was concealed in a visitor's badge without the visitor's knowledge.

ISSUE: Was planting the listening device on an unwitting person pursuant to a Title III intercept order, but without that person's consent, an unreasonable search?

HELD: No.

DISCUSSION: The placement of the listening device was not an unreasonable search because agents are not required to reveal the precise method they will use to conduct the interception. The application and authorization sufficiently described the conversations and speakers, which is all that is required.

* * * *

9th CIRCUIT

U.S. v. Rios, *449 F.3d 1009, June 2, 2006*

Click HERE for the court's opinion.

SUMMARY: To convict someone of possession of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c)(1)(a)), the government must prove something more than that the drug dealer happened to have a gun in his house. Neither a weapon's fitness for crime, nor expert testimony that drug dealers habitually possess weapons to protect their assets and intimidate competitors, is sufficient to establish possession in furtherance of drug trafficking.

FACTS: At his base of operations, an apartment on Burlington Street, Rios sold drugs to an undercover agent. Rios lived in a three-room motel suite in another part of town. He paid his rent in cash. Police executed search warrants at both locations, finding drugs in the Burlington Street apartment and an unloaded, sawed-off shotgun (no drugs or ammunition) in the motel suite.

The motel manager testified that although they had seen several midnight visitors come-and-go there every week, his staff had never seen drugs in the suite. Experts testified that drug dealers commonly use firearms and that sawed-off shotguns, with no legitimate sporting purpose, were particularly favored criminal tools.

ISSUE: Is mere possession of a firearm sufficient to prove possession in furtherance of a drug trafficking crime?

HELD: No.

DISCUSSION: The government must show that the defendant intended to use the firearm to promote or facilitate the drug crime. This is determined by examining factors such as the proximity, accessibility, and strategic location of the firearms in relation to the locus of drug activities.

Neither a weapon's fitness for crime, nor expert testimony that drug dealers habitually possess weapons to protect their assets and intimidate competitors, is sufficient to establish possession in furtherance of drug trafficking.

When balanced against the fact that motel staff had never seen drugs or other evidence of dealing, Rios's midnight visitors and his habit of paying his rent in cash did not justify an inference of drug dealing at the motel beyond a reasonable doubt.

"The firearm was unloaded and hidden under a dresser in a drug-free residence that was in another part of town from the locus of the drug activities…. [If we supported conviction], any person involved in a drug conspiracy who happens to have a weapon at home, for whatever purpose, could be convicted."

* * * *

U.S. v. Thomas, 2006 U.S. App. LEXIS 12178, May 18, 2006

Click HERE for the court's opinion.

SUMMARY: The driver of a rental car, who is not listed on the rental agreement but who has the permission of the authorized renter to drive the car, has standing to challenge a search of the vehicle.

FACTS: Police received information that Thomas was going to drive a rental car to pick up and deliver crack cocaine. The car was rented to another individual, and Thomas was not listed on the contract as an authorized driver. Officers lawfully placed a tracking device on the car. When the car was stopped, Thomas was the sole occupant. A search of the car yielded drugs and cash.

ISSUE: Does the driver of a rental car, who is not listed on the rental agreement but who has the permission of the authorized renter to drive the car, have standing to challenge a search of the vehicle?

HELD: Yes.

DISCUSSION: If the driver of a rental vehicle has permission from the authorized driver of the car, s/he has a reasonable expectation of privacy in the car and can thus challenge a search of the rental car. In this case, Thomas did not have the permission of the authorized renter, so the evidence was properly admitted over his objection.

NOTE: This decision further splits the Circuits regarding who has standing to object to the search of a rental vehicle. The 8th and 9th Circuits hold that a driver who has the permission of the authorized renter has standing; the 4th, 5th and 10th Circuits hold that an unauthorized driver never has standing; and the 6th Circuit uses a totality of the circumstances test, with a broad presumption against standing.

* * * *

D.C. CIRCUIT

U.S. v. Powell, 2006 U.S. App. LEXIS 15763, June 23, 2006

Click HERE for the court's opinion.

SUMMARY: A search of the passenger compartment of a car incident to a lawful arrest must occur *after* the arrest has taken place and not before.

FACTS: Police officers saw Powell urinating next to a vehicle. When an officer *put his head inside* the open window of the car, he saw what looked like beer inside 3 cups. He searched the car, found an open bottle of cognac and a loaded TEC-9 machine gun inside a backpack. Powell was then arrested for possessing the firearm, urinating in public, and having an open container of alcohol.

The government conceded that the officer saw the beer only after he put his head inside the car. That was an unlawful search, and the search that located the gun could not be based on the prior unlawful search that located the beer.

ISSUE: Was the search of the car justified as "incident" to an imminent misdemeanor arrest for urinating in public?

HELD: No.

DISCUSSION: A search incident to arrest can only occur "after" the suspect is taken into custody or told that he is under arrest. The existence of probable cause to arrest alone does not justify a search incident to arrest.